



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Commercial Energies, Inc.

File: B-231993

Date: November 4, 1988

DIGEST

Contracting agency improperly failed to include small disadvantaged business preference in solicitation providing for award to the low, technically acceptable offeror since such an award decision, without a comparative technical evaluation, is essentially based on price; Department of Defense Federal Acquisition Regulation Supplement § 19.7000(a) requires inclusion of preference in solicitations where award will be based on price or price related factors.

DECISION

Commercial Energies, Inc. (CEI) protests that the Department of the Air Force improperly failed to include an evaluation preference for small disadvantaged businesses (SDBs) in request for proposals (RFP) No. F05600-88-R-0004, for the purchase of natural gas. CEI contends that applicable statutes and regulations mandate the inclusion of a 10 percent evaluation preference. We sustain the protest.

Section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3973, established for the Department of Defense (DOD) a goal of awarding SDBs 5 percent of the dollar value of contracts awarded for the fiscal year. As part of the implementation of this program, DOD promulgated regulations providing for application of a 10 percent evaluation preference to SDBs. DOD Federal Acquisition Regulation Supplement (DFARS) § 19.7000.

CEI principally argues that DFARS § 19.7000(a) mandates inclusion of the 10 percent evaluation preference for SDBs in this solicitation. This regulation provides, in pertinent part, that the "evaluation preference shall only be used in competitive acquisitions where award is based on

043774/137258

price and price related factors." CEI contends that price is essentially the basis for award here, as evidenced by the statement in the RFP that award was to be made to the "lowest responsible technically acceptable offeror."

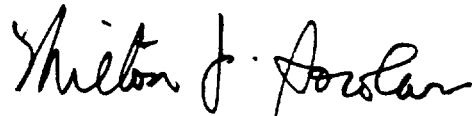
The Air Force maintains that since section M of the RFP provided for a technical evaluation, under which technical capability and reliability of supply were evaluation factors of greater importance than price, DFARS § 19.7000(b) applied (instead of § 19.7000(a)). That provision states that the evaluation preference may also be used in acquisitions other than those covered by paragraph (a), at the agency's discretion, when "SDBs are expected to possess the requisite qualifications, consistent with the demands of the acquisition (e.g., see FAR § 35.007 with regard to technical qualification of sources). . . ." The Air Force concludes that it had discretion to omit the preference here. (The Air Force has suspended further action on the procurement pending our decision.)

We agree with CEI. Although, as the Air Force states, the RFP did set forth factors for a technical evaluation, those factors were not to be used to make relative assessments of competing proposals. Instead, they were to be used only to determine the minimum technical acceptability of a proposal; once a proposal was determined to be technically acceptable, price, not relative technical merit, would be the basis for award. We previously have recognized that where, as here, award is to be made to the low, technically acceptable offeror, the competition is essentially one based on price. See generally Diversified Computer Consultants, B-229765, Feb. 19, 1988, 88-1 CPD ¶ 171. Because the competition essentially was based on price, we think the DFARS required the Air Force to include the SDB preference in the RFP.

Accordingly, we sustain the protest and, by letter of today to the Secretary of the Air Force, are recommending that the solicitation be amended to include the SDB preference.

Further, since we sustain the protest, we find that CEI is entitled to recover its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6 (d)(1)(1988).

The protest is sustained.



Acting Comptroller General
of the United States